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Supreme Court, U.S.
FILED

00-435 JUL - 6 2000

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No. _____

In The

Supreme Court of the United States

HERNANDO OSPINA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

HERNANDO OSPINA
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9+pp

QUESTION PRESENTED

Whether the lower Federal Courts erred in denying petitioner a Certificate of Appealability under 28 U.S.C. Section 2253 when he had demonstrated a substantial showing of the denial of Constitutional Rights?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Summary Judgment of the United States Court of Appeals for the Second Circuit affirming the United States District Court for the Southern District of New York appears at Appendix 1-2 to the petition.

The Opinion of the United States District Court for the Southern District of New York appears at Appendix 3-8 to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Second Circuit decided my case was January 19, 2000. A timely petition for rehearing was denied by the Court of Appeals on April 7, 2000, and a copy of the Order denying rehearing appears at Appendix 9-10.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT
No person shall be. . . deprived of life, liberty, or property, without due process of law.

SIXTH AMENDMENT
In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defence.

28 U.S.C. Section 2253
(a) In a habeas corpus proceeding or a proceeding under Section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(c)(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Petitioner and 17 others were charged in Count I of a six count superseding indictment filed on May 22, 1990. Count I charged a drug conspiracy to distribute 5 kilograms or more of cocaine, in violation of 21 U.S.C. Section 846. The district court granted petitioner's pre-trial motion for severance [without objection from the government]. Thus appellant was tried alone on the conspiracy count.

Co-defendants' Gil, Mora, and Rojo's trial [the first trial] lasted 6 months with a finding of guilt regarding the conspiracy count. Petitioner's trial [the second trial] commenced on October 5, 1992, and on November 13, 1992, the jury returned a verdict of guilt regarding the drug conspiracy count. Both trials were tried by a jury before the Honorable Kimba Wood, U.S.D.J. Sentencing took place on July 23, 1993, where petitioner was sentenced to 151 months' imprisonment under the U.S. Sentencing Guidelines and five years supervised release.

An appeal of petitioner's case was taken to the Second Circuit Court of Appeals in No. 93-1159, which was denied in an unpublished opinion on February 18, 1994.

Petitioner, through counsel, filed a 28 U.S.C. Section 2255 motion in the district court alleging that counsel was ineffective under the Sixth Amendment for (1) failing to perform adequate pre-trial investigation concerning inconsistent positions taken by the government at petitioner's severed co-defendants' trial and thus failing to make appropriate objections, arguments and presentation of a viable defense to contradict the government's case-in-chief at petitioner's trial; (2) failing to object to the drug quantity used to calculate his base offense level under the U.S. Sentencing Guidelines; and (3) failing to object to the government's misconduct at trial and/or the government's failure to disclose exculpatory material under Brady v. Maryland, 373 U.S. 83 (1963) violating the Fifth Amendment's Due Process Clause.

The district court denied petitioner's motion under Section 2255 without providing a hearing on the issues. The district

court's order appears at Appendix 3-8. The district court also denied petitioner a certificate of appealability under 28 U.S.C. Section 2253. Petitioner unsuccessfully moved the Court of Appeals for a certificate of appealability. Petitioner requests that the Court grant him a certificate of appealability, or remand to the Appeals Court ordering it to grant petitioner a certificate of appealability, or order relief as deemed appropriate by the Court.

QUESTION: WHETHER THE LOWER FEDERAL COURTS ERRED IN DENYING PETITIONER A CERTIFICATE OF APPEALABILITY UNDER 28 U.S.C. SECTION 2253 WHEN HE HAD DEMONSTRATED A SUBSTANTIAL SHOWING OF THE DENIAL OF CONSTITUTIONAL RIGHTS?

The Court has authority to grant a federal habeas petitioner under 28 U.S.C. Section 2255 a certificate of appealability pursuant to 28 U.S.C. Section 2253. See Hohn v. United States, 118 S.Ct.____, 141 L.Ed 2d 242 (1998). 28 U.S.C. Section 2253 in relevant part provides for

> "(c)(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

Petitioner filed a 28 U.S.C. Section 2255 motion in the district court alleging (1) that counsel was ineffective under the Sixth Amendment for failing to perform adequate pre-trial investigation concerning inconsistent positions taken by the government at petitioner's severed co-defendants' trial and

thus failing to make appropriate objections, arguments andpresentation of a viable defense to contradict the government's case-in-chief at petitioner's trial; (2) failing to object to the drug quantity used to calculate his base offense level under the U.S. Sentencing Guidelines; and (3) failing to object to the government's misconduct at trial and/or the government's failure to disclose exculpatory material under Brady v. Maryland, 373 U.S. 83 (1963) violating the Fifth Amendment's Due Process Clause.

The district court denied petitioner's motion without providing a hearing on the issues. The district court also denied petitioner a certificate of appealability under Section 2253. Petitioner filed a motion in the Second Circuit Court of Appeals requesting that the court grant a certificate of appealability. The Court denied petitioner's motion. Petitioner then moved the court for rehearing which was also denied by the court.

The appeals court in its summary judgment wrote that:

> "Appellant has filed, pro se for a certificate of appealability. Upon due consideration, it is ORDERED that the motion is denied and the appeal is dismissed. The appellant has not made a 'substantial showing of the denial of a constitutional right.' 28 U.S.C. Section 2253(c)."

Petitioner believes the district court and the appeals court erred in denying him a certificate of appealability.

Petitioner is a pro se prisoner who is unlearned and ignorant in the law so the court should construe his pleading "liberally." Haines v. Kerner, 404 U.S. 519,520 (1972).

THE GOVERNMENT'S CASE PETITIONER

The government's case against petitioner consisted primarily of the "pipes" conversation of November 10, 1989, and the testimony of cooperating witnesses Julio and Dario Alvarez. The Alvarez brothers did not provide any direct or personal knowledge that petitioner was an alleged drug conspirator. But testified indirectly attempting to link petitioner to the Gil drug conspiracy. The linchpin of the government's case was the "pipes" conversation. The government contended that the intercepted "pipes" conversation was indeed a coded drug conversation in Spanish involving 12 kilograms of cocaine. Ten were bad and two were good. Petitioner's contention is that the "pipes" conversation was an innocent plumbing conversation between petitioner and Gil. Gil had employed petitioner to perform some contracting work at his ranch which involved plumbing. Part of the "pipes" conversation involved a discussion of various types of pipes that petitioner was using to perform the plumbing work. Some were plastic and others were copper. The government asserted that the plastic pipes were bad kilograms of cocaine and the copper pipes were good quality kilograms of cocaine.

Subsequent to petitioner's direct appeal, he has learned that the government in the first trial attributed the same bad cocaine to a non-indicted Washington, D.C. co-conspirator

[Barber] who cooperated and testified at the first trial. Barber did not testify at petitioner's trial [the second trial]. Trial and appellate counsel should have reviewed the relevant trial transcripts in the first trial to ascertain this fact, and/or consulted with counsel from the first trial requesting evidence and testimony regarding the government taped phone calls on November 10th and 11th, 1989, and/or requested evidence and testimony from the government regarding the government taped calls on November 10th and 11th, 1989.

The government at petitioner's trial used FBI Agent Garcia (qualified by the court as an expert) to opine from a legitimate plumbing conversation that petitioner had with co-defendant Gil that petitioner received 10 bad kilograms of cocaine from the 1989 Halloween shipment which totaled 60 kilograms [see government's sentencing letter of Plinio Prieto (a co-defendant who pleaded guilty) dated May 14, 1993, App. 11-14 describing the 1989 Halloween load] and his testimony was used by the government to support its trial theory that there were only 10 bad kilograms of cocaine from the 1989 Halloween load and that petitioner had received all of them. See Ospina Trial Tr. at App. 46-51.

In particular, Garcia testified:

Q. At the bottom of page 3 when Fernando Gil says and it seems that he sent you, you, because, no, there were, no after he had picked out the plastic ones for you because according to what he told me there were just ten little plastic rods and the others were all copper pipes.

Do you have an opinion as to what is being referred to?

A. They are referring to the cocaine packages, being plastic and copper.

Q. Do you have an opinion as to what ten little plastic rods refer to?

A. 10 little plastic rods refers to the packages of cocaine from the previous conversations that they were saying was bad,

See Ospina Trial Tr. at App. 47-48.

The government in its closing statement to the jury argued that there were only 10 bad kilograms of cocaine from the 1989 Halloween load and that petitioner had received all of them. See Ospina Trial Tr. at App. 15-21. In particular, the government argued:

> And you know this is the Marlboro cocaine that's being referred to because Fernando Gil refers back to the call with his supplier 16 minutes before. According to what he told me, Gil says, there were just 10 little plastic rods. In other words, just ten bad kilos and the others were all copper pipes, they were OK.
>
> What did the California supplier tell Gil 15 minutes before? The supplier said, I

guarantee that there are ten and it's not like that call me back so I can call Juancho, his representative in New York.

See Ospina Trial Tr. at App. 18-19.

In a nutshell, and most paramount, the government's question posed twice to petitioner in cross-examination, sums up the government's trial theory as petitioner receiving 10 bad kilograms of cocaine from the 1989 Halloween load and that there were only 10 bad kilograms of cocaine in that shipment and that petitioner receive[d] all of them.

Q. Sir, when Fernando Gil says but those were the only ones, what he's telling you is that you are the one who got the bad cocaine and that was the only bad cocaine in the load, correct, Sir?

Q. When Fernando Gil said to you that those are the only ones, he is telling you that you are the only one who got the bad cocaine?

See Ospina Trial Tr. at App. 22.

Two additional points are relevant. At petitioner's trial, the government presented testimony and argued to the jury, that the Gil phone calls to his California cocaine supplier on November 10th and 11th, 1989, were made for petitioner alone. The government never mentioned at petitioner's trial that the [calls] were made for cooperating witness Barber as it presented evidence and argued at the Gil trial (the first

trial). This would have devastated that government's trial theory at petitioner's trial. Then the government would not have been able to present its trial theory that petitioner only received the 10 bad kilograms of cocaine from the 1989 Halloween shipment and that the 10 were the only bad kilograms from that shipment, i.e., "You [Ospina] are the only one who got the bad cocaine" and "You [Ospina] are the only one who got the bad cocaine and that was the only bad cocaine in the load." See Ospina Trial Tr. at App. 22.

Moreover, quite interesting is the fact that the government did not oppose petitioner's severance motion from the Gil trial [which was granted by the district court] -- something the government rarely does in drug conspiracy cases -- especially in light of the fact that there were only a few co-defendants being tried in the first trial.

THE TEN BAD KILOGRAMS OF COCAINE IN THE GIL TRIAL

The government presented evidence and argued to the jury in the Gil [the first trial] that cooperating witness Barber from Washington, D.C., receive[d] 10 to 15 kilograms of cocaine from the 1989 Halloween shipment and that there were only 10 bad kilograms from that shipment. See Gil Trial Tr. at App. 23-35; Government's sentencing letter dated 5/14/1993 at App. 11-14; Presentence Report at App. 36-41; Gil Trial Tr. at App. 42-45, App. 52-53.

In particular, the government argued:

I guarantee they're ten . . . the ten kilos of cocaine that Gil had been talking to the California supplier about, about the ten bad kilos. . . . *Gil determines that there were only ten* kilos that were poor quality. But Gil does get a price reduction on the ten that he determined were bad quality.

(Parenthetically, this same argument was made at both trials. See Gil Tr. at App. 42 and Ospina Trial Tr. at App. 15. In the Gil it was made for Barber and at the Ospina trial it was made for petitioner. The government wants its cake and to eat it too.)

The government in its May 14, 1993 sentencing letter regarding Plinio Prieto mentions the Halloween 1989 load. It states:

B. 60 Kilograms of Marlboro-Brand Cocaine:

As reflected in paragraphs 69-81 of the Presentence Report at App. 36-41, in November of 1989, Gil receive at least sixty kilograms of cocaine from one of his suppliers, Jairo Pineda, and the cocaine was distributed through Plinio Prieto to customers such as Everett Barber. The independent and overlapping proof of this cocaine transaction as well as Prieto's involvement is simply overwhelming:

1. Everett Barber testified that after Halloween in 1989, Plinio Prieto sent him and his partner Lou 10-15 kilograms of cocaine that had the label "Marlboro." (App. 23-35) He described that because of the poor-quality of this cocaine, they complained to Prieto and Prieto told Lou that he would try to get a price reduction.

2. Barber's testimony was corroborated by numerous independent strands of evidence:

a. Telephone conversations and calls to beepers in early November 1989 that were intercepted over the Manorville Mobil Station Pay Phones.

During these conversations, Gil called his supplier Jairo Pineda at a cellphone in California and talked about the "Marlboro-brand" cocaine in a coded fashion -- for example, Gil complained about the quality of the sixty kilograms and asked for a price reduction. At the end of the first call, Gil told his supplier he would call someone to determine how much of the total load was bad. Gil immediately placed a call to Plinio Prieto's beeper. In addition, as reflected in the PSR, both before and after those calls by Gil to his Californian supplier, Gil and his worker Jairo Uribe were surveilled and intercepted placing calls to Prieto's beeper (508-5233) and receiving some incoming coded narcotics calls from Plinio Prieto on the same Mobil Station Pay Phones. (App. 36-41 PSR Par. 73-79). In one of the calls, Prieto complained about having to go into the stash house to look at the cocaine. (App. 38-39 PSR Par. 76), GX 19). Gil had already been intercepted telling his supplier that he was going to send someone in to determine how many of the sixty kilograms were bad. (GX 16).

Id. at pages 7-8.

INEFFECTIVE ASSISTANCE OF COUNSEL

Under Strickland v. Washington, 466 U.S. 668 (1984), to establish ineffective assistance of counsel a criminal defendant must show that counsel's conduct was deficient (i.e., "outside the wide range of professionally competent assistance'), id. at 690, and that the deficiency resulted in prejudice to the defense (i.e., "there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different"). Id. at 694. Appeal counsel erred in failing to raise the issues argued herein in petitioner's direct appeal brief, or as an alternative, Section 2255 was the first available forum for petitioner to argue these issues. See Bond v. United States, 1F.3d 630, 634 (7th Cir. 1994) (counsel ineffective for failing to raise "dead bang" winner on appeal, even though counsel raised strong issues on appeal; holding "ineffectiveness was compounded by ineffectiveness"). See also Mason v. Hanks, 97 F.3d 887, 894 (7th Cir. 1996)(ineffective assistance when counsel failed to raise obvious and significant issues without legitimate strategic purpose); Banks v. Reynolds, 54 F.3d 1508, 1515-16 (10th Cir. 1995)(ineffective assistance of counsel when appellate counsel failed to raise issue that government failed to provide exculpatory Brady material); Mayo v. Henderson, 13 F.3d 528, 533-37 (2d Cir. 1994)(counsel ineffective for failing to request prosecutor's notes on its witnesses); Giglio v. United States, 405 U.S. 150 (1972)(deliberate deception of a court by the prosecution of knowingly false evidence is incompatible with the

rudimentary demands of justice). The government has the duty to correct false evidence when it is offered. Napue v. Illinois, 360 U.S. 264 (1959); and has the duty not to argue false or inadmissible evidence to the jury. Miller v. Pate, 368 U.S. 1 (1967) See Brown v. Borg, 951 F.2d 1011, 1017 (9th Cir. 1991) (reversal required when prosecutor knowingly introduced and argued false evidence); Brown v. Wainwright, 785 F.2d 1457, 1464 (11th Cir. 1986) (reversal required when government violated "duty not to present or use false testimony"). In United States v. Valentine, 820 F.2d 567 (2d Cir. 1987), the Second Circuit reversed the defendant's conviction when the prosecutor knowingly misrepresented the defendant's grand jury testimony to the petit jury.

INSTANCES OF INEFFECTIVE ASSISTANCE OF COUNSEL

Trial counsel failed to acquaint himself with the relevant trial transcript of the first trial where the government presented evidence and argued that government cooperating witness Barber from Washington, D.C., received 10 bad kilograms of cocaine from the 1989 Halloween load. Thus counsel precluded himself from making appropriate objections, arguments and presentation of witnesses to contradict and undermine the government's case. The government in petitioner's case contended that petitioner received the 10 bad kilograms from the 1989 Halloween load where it was contended by the government that there were only 10 bad kilograms in that load.

Moreover, counsel's failure to acquaint himself with the trial record of the first trial, precluded him from arguing the government's inconsistent trial theories regarding the 10 bad kilograms of cocaine to create reasonable doubt in the verdict. The Second Circuit Court of Appeals in United States v. GAF Corp., 928 F.2d 1253, 1262 (2d Cir. 1991) and United States v. McKeon, 738 F.2d 26, 32-33 (2d Cir. 1984), have held that defense attorneys can argue to the jury the government's inconsistent trial theories creating a reasonable doubt in a verdict.

Furthermore, trial counsel failed to obtain an expert witness to interpret the "pipes" conversation to contradict the government's case. In February of 1997, petitioner had expert Raymond J. McConnie interpret the "pipes" conversation (App. 54-63). His evaluation was attached as an exhibit to petitioner's Section 2255 motion in the lower courts. McConnie concluded that "there is no way of knowing whether this particular conversation has anything to do with illegal activity absent extrinsic evidence thereof that can be directly connected to the particulars discussed by the interlocutors." McConnie's proffered testimony would have helped undermine the government's case. Also, if counsel would have acquainted himself with the relevant trial record from the first trial, he could have subpoenaed Barber as a defense witness. Barber would have been constrained [because of his prior testimony in the first trial] to testify that he received 10 bad kilograms of cocaine from the 1989 Halloween load. Barber's testimony would have undermined the government's case creating a reasonable doubt in the verdict.

Trial counsel also erred in failing to request from the government any exculpatory material from the first trial. By making such a request, the government would have been obligated to turn over Barber's testimony and its relevant closing arguments concerning the November 10th and 11th, 1989 phone calls. Brady would have been violated if the government failed to provide the above information.

Appeal counsel was ineffective for failing to acquaint himself with the relevant trial record from the first trial, thus failing to compare the evidence, testimony and government arguments from both trials in regards to the November 10th and 11th, 1989, government taped phone calls and Barber's testimony. With adequate research, counsel could have made appropriate arguments that the government's case was inconsistent and both Barber and petitioner could not have received the 10 kilograms of bad cocaine from the 1989 Halloween load when they were only 10 kilograms of bad cocaine from that load.

Moreover, appeal counsel, if he had acquainted himself with both trial records could have made appropriate argruments that petitioner's sentence under the U.S. Sentencing Guidelines was based on an impermissible consideration. The 10 bad kilograms of cocaine established petitioner's base offense level. Furthermore, appeal counsel should have requested Brady material from the government. On May 14, 1993, some three months prior to petitioner's sentencing in July of 1993, the government wrote the district court a letter in regards to Plinio Prieto's sentencing. In this letter, it mentions that cooperating witness Barber received

10-15 bad kilograms of cocaine from the 1989 Halloween load [and] made similar arguments from the first trial as were made in petitioner's trial.

Sentencing counsel (who was different from trial counsel), failed to object to the drug quantity used to establish petitioner's base offense level under the U.S. Sentencing Guidelines and failed to present an expert witness (Raymond McConnie, see ante) opining that the "pipes" conversation was not a drug related conversation (App. 54-63). The 10 bad kilograms of cocaine was used to establish petitioner's base offense level. Moreover, counsel could have subpoenaed Barber as a defense witness at petitioner's sentencing hearing to testify that he was the one who received the 10 bad kilograms of cocaine from the 1989 Halloween load. The quantity of the controlled substance is not a question for the jury to decide. See United States v. Deisch, 2F.3d 139, 151 (5th Cir. 1994); United States v. Michael, 10 F.3d 838 (D.C. Cir. 1993) (government must prove to the jury a controlled substance violation under 21 U.S.C. Section 841(a), but the type and [quantity] is a sentencing determination). Thus, at sentencing, it was counsel's responsibility to hold the government responsible for the drug submission in the Presentence Report at App. 64, par. 157. Especially in light of its conclusory nature as it was written in the Presentence Report. Furthermore, sentencing counsel should have made a Brady request. The government's sentencing letter of May 14, 1993 (App. 11-14) was subsequent to the jury verdict in petitioner's case. This letter as mentioned above would have undermined the evidence and verdict in petitioner's case.

THE GOVERNMENT'S MISCONDUCT

Under Brady v. Maryland, 373 U.S. 83 (1976), the government had a duty to disclose exculpatory material. If petitioner's counsel did not request Brady material, then he was derelict in his duties. There was no hearing on this issue so the record is unclear to where the blame lies. Whatever the case, either the government or

counsel was amiss. Brady required the government to provide Barber's testimony and relevant closing arguments from the first trial in regards to the November 10th and 11th, 1989 phone calls to
petitioner's counsel. Trial counsel then could have used the exculpatory material to undermine the government's case and create a reasonable doubt in the verdict. See also Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987) where a reasonable probability is a probability sufficent to undermine conficence in the outcome.

The Second Circuit in U.S. v. Payne, 63 F.3d 1200, 1208 (2d Cir. 1995), observe that:

> [U]nder Brady and its progeny, the government has an affirmative duty to disclose favorable evidence know to it, even if no specific disclosure request is made by the defense. See, e.g., Kyles v. Whitney, 131 L. Ed. 2d 490 or United States v. Agurs, 427 U.S. 97, 108-10.

The government's misconduct was exacerbated by introducing FBI Agent Garcia as an expert witness opining that there were 10 bad kilograms of cocaine from the "pipes" conversation knowing that it attributed the 10 bad kilograms of cocaine from the 1989 Halloween load to Barber in the first trial and then attributing the same 10 bad kilograms of cocaine to petitioner at the second trial while arguing that there were only 10 bad kilograms of cocaine from that load. This was a deliberate and calculated strategy by the government to obtain an unjust verdict.

THE DISTRICT COURT'S ORDER DENYING PETITIONER'S SECTION 2255 MOTION

It is clear from the government's evidence and testimony in the Ospina trial -- that there were only 10 bad kilograms of cocaine from the 1989 Halloween load and that petitioner received all of them. The government questioned petitioner: "[You](Ospina) are the one who got the bad cocaine and that was the only bad cocaine in the load, correct. Sir?" See Ospina Trial Tr. at App. 22.

The district court in its Order wrote that petitioner misunderstood the evidence at the Gil trial, thus finding that there was no misconduct by the government or counsel made no egregious trial errors. Specifically, the court wrote that the government presented evidence of 20, and/or 10 kilograms of cocaine in the Gil trial. The district court did not interpret the evidence as a whole. Or put another way, the court lifted out of context testimony involving alleged co-conspirator Gil's question with his California cocaine supplier ["the Gil question"] of how many kilograms of

cocaine were bad from the 1989 Halloween load and labeled it as the government presented evidence that there were 20 kilograms of 10 kilograms of bad cocaine from that load. The "Gil question" was simply that -- a preliminary question by Gil. The "Gil question" was only part of the mosaic the government was painting in regards to its evidence involving the 1989 Halloween load and the 10 kilograms of bad cocaine that Barber had received from that shipment. The government had to explain to the jury the taped conversations of November 10th and 11th, 1989, it could not just have leaped to its conclusion that there were only 10 bad kilograms from that load. But it had to present its case, line by line, to explain the "Gil question" to the jury and how he determined that there were only 10 bad kilograms of cocaine from that load. The district court misapprehended this crucial fact and found that the government had presented evidence of 20 bad kilograms of cocaine and/or 10 bad kilograms of cocaine in the Gil trial. See relevant Gil trial documents to contradict the court's finding: Gil Trial Tr. at App. 23-35; Government's sentencing letter dated 5/14/1993 at App. 11-14; Presentence Report at App. 36-41; Gil Trial Tr. at App. 42-45, App. 52-53.

CONCLUSION

It is clear from the government's evidence and testimony at petitioner's trial -- that its trial theory was that there were only 10 bad kilograms of cocaine from 1989 Halloween load and that petitioner allegedly received all of them. In the Gil trial (the first trial) -- the government's trial theory was that cooperating witness Barber received 10-15 kilograms of bad cocaine from the 1989 Halloween load. The government's theory was that there was only 10 bad kilograms of cocaine from that load. Thus, how could Barber and petitioner both receive 10 bad kilograms of cocaine from the same load when the government argued that there were only 10 kilograms of bad cocaine from the 1989 Halloween load. Barber was a government cooperating witness who the government vouched for as telling the truth in the 5/14/1993 sentencing letter, App. 11-14, paragraphs 1-2 . Petitioner is innocent of this crime. He is a first-time offender serving a lengthly sentence of 151 months. Petitioner has a wife and three young children. He is not a drug conspirator as the government alleged. With adequate representation by counsel under the Sixth Amendment and with a proper Brady disclosure under the Fifth Amendment by the government -- petitioner's trial verdict would have been undermined. Petitioner is prejudiced by being convicted and sentenced to 151 months' imprisonment under the U.S. Sentencing Guidelines.

The Court should grant petitioner a certificate of appealability; or remand to the appeals court for a certificate of appealability; or order relief as deemed appropriate.

Respectfully Submitted,

Hernando Ospina
Pro Se

Dated: 9/18/00

S.D.N.Y.
97-cv-2838
Wood, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 19th day of January two thousand,

Present:

Hon. Pierre N. Leval,
Hon. Fred I. Parker,
Hon. Robert A. Katzmann,
Circuit Judges

Hernando Ospina,

Petitioner-Appellant,

v.

98-2882

United States of America,

Respondent-Appelle.

(Filed Jan. 19, 2000)

Appellant has filed, pro se, a motion for a certificate of appealability. Upon due consideration, it is ORDERED that the motion is denied and the appeal is dismissed. The appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c).

SIGNED Jan. 19, 2000

FOR THE COURT
Karen Greve Milton, Acting Clerk

By:_____
/s/ Lucille Carr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

HERNANDO OSPINA, 97 Civ. 2838 (KMW)

Petitioner,

-against-

UNITED STATES OF AMERICA, ORDER

Respondent.

----------x

Wood, D.J.

Hernando Ospina moves for relief pursuant to 28 U.S.C. § 2255 ("the petition"). For the reasons states below, the Court denies his petition.

Mr. Ospina was convicted of conspiracy to distribute five kilograms or more of cocaine, in violation of Title 21, United States Code, Section 846, after a trial that lasted slightly over one month. His trial was severed from that of his co-conspirators, at his request, and followed trial of his co- conspirators. In this petition, Ospina argues that (1) the Government withheld exculpatory material, in violation of Brady v. Maryland, 373 U.S. 83 (1976), and (2) the Government engaged in prosecutorial misconduct, (3) his trial counsel, sentencing counsel, and appellate counsel all rendered ineffective assistance, and (4) this Court improperly calculated his Sentencing Guidelines range.

Allegations Concerning Exculpatory
Material and Prosecutorial Misconduct

The Court will address petitioner's first two claims together, because of the overlap in his allegations concerning withholding allegedly exculpatory information and prosecutorial conduct. The essence of this contention is that evidence presented at Ospina's co-conspirators' trial ("the Gil trial") exculpates him and should have been provided to him by the Government, and that the Government's theory at the Gil trial was irreconcilably inconsistent with the Government's theory at Ospina's trial ("the Ospina trial"). These arguments fail because the evidence in question does not exculpate defendant and was available to defendant, and because the Government's theories at the two trials were not inconsistent.

Defendant's argument that the Government presented evidence in the Gil trial that exculpates him rests on a misreading of the evidence in the Gil trial. Defendant claims that, in the Gil trial, the Government presented testimony to the effect that exactly 10 kilograms of bad "Marlboro" brand cocaine were supplied at a particular time period, and that those were all delivered to a man named Barber. Defendant contends that that purported testimony (and that purported Government theory of the case) are inconsistent with what he claims was the Government's position in the Ospina trial that Ospina received 10 kilograms of bad cocaine at about this

time, in the course of this same conspiracy.[1] Although the evidence presented by the Government in the Gil trial included evidence supporting the proposition that some conspirators decided to seek a discount from his supplier on 10 kilograms of cocaine), the Government also presented evidence in the Gil trial that Gil believed at one time that there were 20 kilograms of bad cocaine. The testimony as a whole from the Gil trials establishes only that at various times, one or more conspirators believed that there were (1) 10 kilograms of bad cocaine, or (2) 20 kilograms of bad cocaine, or (3) "some" quantity of bad cocaine. Petitioner is mistaken in claiming that the Government's position in the Gil trial was that there were only 10 kilograms of bad cocaine.

To the extent that Ospina's argument rests on his claim that the Government contended in the Ospina trial that Ospina received 10 kilograms of bad cocaine, he is mistaken. The Government's proof in the Ospina trial was that Ospina received most of the bad cocaine, but that the remainder of the bad cocaine was distributed to customers in other locations.

I find that the evidence does not support either petitioner's Brady claim or his claim of prosecutorial misconduct.

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[1]The quality of the cocaine received by Ospina was important because wiretapped conversations to which defendant was a party related to a bad product (which the Government alleged was bad cocaine).

I note that the notion that there was any Brady violation is further undercut by the fact that all the evidence in the Gil case was available to Ospina and his counsel.

Claimed Ineffectivenesss of Counsel

Even if the court were to credit Ospina's unsupported claim that his trial counsel failed to speak to counsel in the Gil trial and failed to review the Gil trial transcript, the court has no reason to conclude that Ospina's counsel was not effective.

During the course of the Ospina trial, the Court had many opportunities to evaluate the effectiveness of defense counsel, and did so against the backdrop of the Gil trial that preceded it, which itself lasted about six months. None of the tactics that Ospina now contends his lawyer should have employed appears to the Court -- even with the benefit of hindsight -- to be wise. For example, Ospina's counsel's failure to call Mr. Barber (now cited by Ospina as a mistake) was, in the Court's view, prudent. Barber's testimony in the Gil trial was neither inconsistent with the Government's theory and evidence in the Ospina trial, nor exculpatory of Ospina. Indeed, it could have slightly bolstered the Government's case by corroborating that Gil had been supplied bad cocaine at the same time that Ospina was recorded discussing bad product with Gil, and by corroborating a portion of the testimony of Julio Alvarez.

Claimed Sentencing Error

Ospina claims that the Court had insufficient basis to attribute a drug level of 5-15 kilograms of cocaine to him at sentencing.

Although Ospina should have raised this issue on direct appeal and should be barred from raising it now, because of his claim of ineffective assistance of appellate counsel, the Court will address it here (without in any way agreeing with Ospina's claim of ineffective assistance). This claim is unavailing because at trial there was ample credible evidence that Ospina conspired in the distribution of 12 kilograms of cocaine.

Application for Release on Bail

The Court denies Ospina's application for bail because he does not raise any substantial claim in this Petition. A bail applicant in a habeas proceeding must show both that he has raised substantial claims and that extraordinary circumstances warrant bail. See Ostrer v. United States, 584 F.2d 594, 596 n.1 (2d Cir. 1978). In Iuteri v. Nardoza, 662 F.2d 159 (2d Cir. 1981), the Second Circuit ruled that the district court's release of a habeas petitioner on bail was an abuse of discretion, where the petition was "devoid of facts which distinguish it in any way from typical habeas proceedings." Id. at 162. Ospina must show a "demonstrated likelihood that the petition will prevail, based upon claims of a

substantial nature upon which the petitioner has a ghigh probability of success ... so that victory for petitioner can be predicted with confidence." United States v. Yarmoluk, 1997 WL 642564 (S.D.N.Y. Oct. 17, 1997) (quoting in part Richard v. Abrams, 732 F. Supp. 24, 25 (S.D.N.Y. 1990)). As discussed above, Ospina has presented no substantial claims, much less claims that are likely to be ultimately successful. Nor has Ospina pointed to any "extraordinary or exceptional circumstances" that would justify release on bail. See Ostrer, 584 F.2d at 596 n.1. Accordingly, his application for bail is denied.

SO ORDERED.

DATED: New York, N.Y.
September 25, 1998

SIGNED September 25, 1998

/s/ Kimba M. Wood
Kimba M. Wood
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 7th day of April two thousand.

Ospina
Petitioner-Appellant

v. Dkt No: 98-2882

USA
Respondent-Appellee

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Hernando Ospina.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FILED AND SIGNED April 7, 2000

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

/s/ By: Beth J. Meador
Beth J. Meador,
Administrative Attorney

remarkable because it flies in the face of the evidence. The Government never seized any so-called meticulous records from Gil or his workers. Rather, it seized records maintained by the Prada organization in 1988 -- one of Gil's suppliers.

Finally, Prieto incorrectly asserts that the Presentence Report improperly imputes to Prieto every single kilogram of cocaine ever distributed by Fernando Gil. To the contrary, the Report takes a much more conservative approach. Although the evidence is strong that Prieto worked in Gil's drug business at the highest levels for many years, the Government and the Probation Department did not attempt to attribute numerous Gil-related transactions to Prieto.[4]

B. 60 Kilograms of Marlboro-Brand Cocaine

As reflected in paragraphs 68-83 of the Presentence Report, in November of 1989, Gil received at least sixty kilograms of cocaine from one of his suppliers, Jairo Pineda, and the cocaine was distributed through Plinio Prieto to

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[4]For example, the 1,383 kilograms of cocaine reflected in the Fernando Gil account designation in the Charria Drug Records have not bee attributed to Prieto for purposes of his guidelines calculation, nor have the three kilograms of cocaine sold by Gil and Alvarez to Toro in March of 1990.

customers such as Everett Barber. The independent and overlapping proof of this cocaine transaction as well as Prieto's involvement is simply overwhelming:

1. Everett Barber testified that after Halloween in 1989, Plinio Prieto sent him and his partner Lou 10-15 kilograms of cocaine that had the label "Marlboro." (Tr. 4795-4806). He described that because of the poor-quality of this cocaine, they complained to Prieto and Prieto told Lou that he would try to get a price reduction.

2. Barber's testimony was corroborated by numerous independent strands of evidence:

a. Telephone conversations and calls to beepers in early November 1989 that were intercepted over the Manorville Mobil Station Pay Phones.

During these conversations, Gil called his supplier Jairo Pineda at a cell phone in California and talked about the "Marlboro- brand" cocaine in a coded fashion -- for example, Gil complained about the quality of the sixty kilograms and asked for a price reduction. (GX 16 and 22).[7] At the end of the first call, Gil told his supplier he would call someone to

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[7]These conversations are summarized in greater detail in ¶¶ 74 and 77 of the PSR.

determine how much of the total load of cocaine was bad. Gil immediately placed a call to Plinio Prieto's beeper. In addition, as reflected in the PSR, both before and after those calls by Gil to his Californian supplier, Gil and his worker Jairo Uribe were surveilled and intercepted placing calls to Prieto's beeper (508-5233) and receiving some incoming coded narcotics calls from Plinio Prieto on the same Mobil Station Pay Phones. (PSR ¶¶ 73-79). In one of the calls, Prieto complained about having to go into the stash house to look at the cocaine. (PSR ¶ 76; GX 19). Gil had already been intercepted telling his supplier that he was going to send someone in to determine how many of the sixty kilograms were bad. (GX 16).[a]

b. Physical surveillance showing Fernando Gil placing calls to Plinio Prieto, as well as meeting with him several times in November of 1989. (Summarized in ¶ 73-82 of the Presentence Report).

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[a]Some of the many times that Fernando Gil, Jairo Uribe, or Omar Gomez, were surveilled leaving the ranch and driving to the Manorville Mobil Station Pay Phones to contact Plinio Prieto on his beeper are summarized at ¶¶ 79-81 of the PSR.

c. The testimony of Julio Alvarez.

Alvarez testified that during the fall and early winter if 1989-90, Fernando Gil had told him that Prieto was busy collecting drug money on behalf of Gil. (e.g. Gil Tr. 782-86, 802, 821-22, 904-07). That testimony was corroborated by numerous wiretap calls. (e.g. GX 34, 104).

Prieto's efforts to distance himself from the full scope of the Marlboro-brand cocaine deal are simply unavailing. The direct and circumstantial evidence more than amply demonstrates his critical role in this entire deal. Thus, the inclusion of this transaction in the calculation of Prieto's base offense level is hardly, as Prieto claims, an effort to "attribute to Prieto every kilo that Gil ever obtained, without any evidence of Prieto's involvement or knowledge." (Prieto Ltr. at 3).

Government Exhibit 12 is a call in which Fernando Gil is complaining about the poor quality of cocaine he received from the supplier, Jairo Pineda. How do you know Fernando Gil is talking about drugs? First, remember Gil is talking on the pay phone about a mile away from the ranch, his own phone.

What does Gil say in this call? He say, Why did they give me the worse, that looks like the ugliest, sir of all and it looks like it was picked at because they were all opened.

He is complaining about the quality of cocaine he received. Gil says he looked at it and it was cafe. Cafe means coffee but it also mean brown. What did Julio Alvarez tell you that Fernando told him? That the cocaine was not selling because it was brown, it was not shiny.

When Gil complains he was told, They gave you 10 boxes, the rest of bran A-1, Marlboro, Marlboro cigarettes. He is being told that he got 10 kilograms of the bad stuff. The supplier asked Gil, what number did they give you? How many kilograms of cocaine did you get? Gil says 60. And of the unknown male, the supplier says they gave Gil 50 Marlboro and that other one, meaning the ten bad kilos.

Gil says he got 20 bad ones, not ten. So the supplier tells Gil to, Go and get me the information that I need, look and see if there aren't 40 Marlboros. And then

on page 7 he says, Give me the information as to the brand and call me and tell me.

The supplier wants Gil to check how many kilos he has received, how many are good, how many are bad and what the brands are. How else do you know they are talking about cocaine?

You know that even though Fernando Gil makes reference to coffee they are not talking about coffee, because he says the packages are wrapped like coffee. And you know at some point somebody is mentioning cigarettes but they are not talking about Marlboro cigarettes because there is a great deal of conversation about money being paid, ladies and gentlemen, a little guitar.

How much money could be at stake with Marlboro cigarettes? The supplier's concern makes it clear they are talking about cocaine, 60 kilos worth. Agent Garcia told you $20,000 per kilo is an average price in 1989 in this area, that's more than a million dollars.

What does Fernando Gil do immediately after his California supplier tells him to find out about the cocaine that he's gotten? Gil reaches out to the people who will be able to give him some information. One is Plinio Prieto, his main worker who has distributed much of the cocaine and Hernando Ospina, his customer who bought some of it.

How do you know that?

Recall the summary, Government Exhibit 500 which is in evidence. It is a summary of certain telephone calls to and from the pay phones at Mobile Station in October and November. That's based on the pen registers which are on those phone collecting information of what calls were coming in and out.

That summary indicates that at 10:47 a.m. Gil made the Marlboro call, this is on November 10. Five minutes later at 10:52 a.m., Gil calls 212-508-5233. That's Plinio Prieto's number and we will talk about how you know that in a little bit.

Then a minute later at 10:53, in Government Exhibit 13 which you heard and read, Gil calls the Ospina residence and reaches Angie Ospina. Angie says Hernando is not around but she will contact him.

Then you look at the tolls records for the Ospina phone at Sautell Avenue, Government Exhibit 300, and you will see that there, again on November 10 at 10:55 a.m. there is a phone cause from the owes residence to Hernando Ospina's beeper 212-484-0004 and you know that's the defendant's beeper because he told you he had that beeper for five years before the time of his arrest. And at 11:03, 16 minutes from the beginning of the Marlboro call is Government Exhibit 14, Hernando Ospina calls Fernando Gil at the ranch.

Remember they are talking at the ranch, no longer at the public phone so they can't be as explicit about what they are saying but they are talking about cocaine. They are talking about the same Marlboro load that Gil was talking about with his California supplier just 16 minutes before. What does Gil ask Ospina in this conversation?

Did you throw out the garbage? What garbage, ladies and gentlemen? Agent Garcia told you that garbage is a word commonly used in the drug business to refer to bad cocaine. Ospina says, no, not yet, maybe later on. And then let's see if they take at least half. At least half of the bad cocaine. Gil wants to know if they have been able to get rid of the bad cocaine and Ospina says not yet.

Gil talks about the little spares that they sent you for the toilets, there were some cooper ones and others made of plastic, right?

And you know that's a code for good quality, the cooper good quality kilos and the plastic, bad quality kilos and the plastic, bad quality kilos.

And you know this is the Marlboro cocaine that's being referred to because Fernando Gil refers direct back to the call with his supplier 16 minutes before. According to what he told me, Gil says, there were just 10 little plastic rods. In other words, just ten bad kilos and the others were all copper pipes, they were OK.

What did the California supplier tell Gil 15 minutes before? The supplier said, I guarantee that they are 10 and if it's not like that call me back so I can call Juancho, his representative in New York.

Back to Government Exhibit 14, the call between Gil and Ospina, Gil again refers back to the California supplier, He told me to, to make sure, brother. What had Gil been told earlier? To make sure what the cocaine was that he received.

In that call with Ospina Gil wants to know if he has been able to get rid of that bad cocaine. Later on Ospina and Gil discuss further what to do with the bad cocaine, whether to sell it at a lower price or to try to get the supplier to take it back.

Ospina tells Gil the best thing would be to throw out even if it is only that garbage until it can finally be taken. Then Ospina says, One pays the garbage truck and they will take it. That is, if they pay the transport maybe the supplier will take the bad stuff back.

Do you think Fernando Gil and Hernando Ospina are talking about pipes and plumbing here, ladies and gentlemen? Look at what Hernando Ospina says when Gil tells him in that call that his supplier told him he needed to have that fixed well and change all that pipeline, referring to the possibility of exchanging the bad kilos.

Ospina says, sure, its logical, because that's the way we solder better, it's logical because let's say that we solder better with the copper pipes.

Solder better with copper rather than plastic pipes? Who solders plastic pipes? What are they talking about? Ospina is saying that copper, good quality kilos sell better than the plastic, the bad quality kilos.

Do you really think when Fernando Gil gets off the phone with his California supplier he is going to immediately reach out to Hernando Ospina to talk about plumbing, talk about the pipes at the ranch?

The next day, the day after November 10, on November 11, Government Exhibit 15 Plinio Prieto, Fernando Gil's main worker reports to Chiqui about the same Marlboro load of cocaine and they have a discussion about changing five or 10 kilos of cocaine and about entering and leaving that house, the stash house where Plinio's got some of the cocaine.

Then in the evening of November 11, still a day after the Marlboro call, a day after the call about pipes with Mr. Ospina and Mr. Gil, Gil and Ospina return to the talk about copper and plastic pipes in Government Exhibit 17, about the good and bad cocaine.

Gil tell Ospina that Plinio has checked and found there were only 10 bad kilo packages. He got there

and he told me, Look, I looked at them, since just those few came I gave him those fewer ones, understand? Ospina says, Yes, and Gil says, Those were the only ones meaning those were the only bad kilos. Ospina is upset saying, I don't believe that. He can't believe he got stuck with the bad kilos of cocaine.

And then later still on November 11, in Government Exhibit 18, Gil reports back to the California supplier. The supplier tells Gil that he is no longer known as Fish, he has been promoted to Shark in the organization's computer.

The supplier asks if Gil has cleared up the situation, if Gil verified what portion of the drugs is bad. Gil says he look at some of the cocaine himself, it came in a package of tens and, I opened the other one and I asked the man, referring to Plinio, his worker, so I wouldn't have to go in there, he wouldn't have to go into the stash house, if they were all like that, and he, meaning Plinio said yes, but I went and looked at them, and no, let's see if it is not ten, brother, Gil said that the man Plinio told me brother that the other stuff was good. Meaning the other kilos received were good quality.

When the supplier asks Gil for payment, get going he says, Gil asks, If you are going do reduce for me those ten, cut the price, Gil asks for the supplier to reduce it a

"and he got there," it is your understanding, sir, that he is referring to your father?

A. Yes.

Q. Sir, when Fernando Gil says "but those were the only ones, what he's telling you is that you are the one who got the bad cocaine and that was the only bad cocaine in the load, correct, sir?

THE INTERPRETER: I can't find that part.

THE COURT: Read the question back.

Q. When Fernando Gil said to you but those are the only ones, he is telling you that you are the only one who got the bad cocaine?

A. Whether he's asking me that, no.

Q. When you say, "I don't believe that. Well, yes buddy," is it your testimony you are telling Fernando Gil you don't believe that the wrong pipes were delivered?

A. Well, I've had experience with Miguel. I laugh here because I know that Miguel has experience in plumbing.

Q. Now you are talking about Miguel?

A. Yes, a boy that works at the plumbing store.

Q. Now, sir, at the bottom of the page when Fernando Gil says, oh, yeah, he's the one who is going to go, "you say, "Ah fine, so he can talk to," Fernando Gil says, "call there bro' and explain it to him, explain it to him," you

recall seeing the red Mitsubishi?
A. Around Halloween.
Q. Of 1989?
A. Yes.
Q. During this time in 1989, did you sell the cocaine that you received on the street?
A. No.
Q. In 1988 and 1989, approximately how many different customers did you have?
A. Eight or nine.
Q. What was the average quantity of the sales you made to those customers?
A. Five keys at the most.
Q. Were your customers users or sellers in their own right?
A. Sellers.
Q. Mr. Barber, let me direct your attention now to the end of October 1989 just after Halloween. Did you receive a delivery of cocaine at about that time?
A. Yes.
Q. How many kilos do you recall receiving?
A. Around 10 or 15.
Q. Who supplied that cocaine?
A. Pliny.

Q. Do you recall who it was that delivered that cocaine?
A. Either Ears or Tiberio.
Q. Who unloaded the cocaine in D.C.?
A. Myself.
Q. Do you recall what the price was charged per kilo, what you and Lou were charged for that delivery of cocaine?
A. In the high twenties.
Q. In the high twenty thousands?
A. Yes.
Q. What marking if any do you recall was on that particular load of cocaine?
A. Marlboro.
Q. Can you tell the jury what you observed what the label looked like?
A. Just like the cigarette logo.
Q. Have you seen that particular logo or making before on the kilos of cocaine you have received?
A. No.
Q. What form was that Marlboro brand of cocaine in when you first received it?
A. Powder.
Q. Do you know what crack cocaine is?
A. Yes.

Q. How do you know what crack cocaine is?

A. I made it before.

(Continued on next page)

Q. What is crack cocaine
A. Cooked up coke.
Q. What is the consistency, what form does crack cocaine take?
A. Solid form.
Q. And the Marlboro brand cocaine that you received was what form?
A. In a powder form.
Q. Now, when you received the Marlboro brand of cocaine, was it in a powder form that's consistent with being used as crack cocaine?
A. No.
Q. What do you need to do, based on your experience, to powder cocaine to make it into crack cocaine?
A. Water and baking soda.
Q. What did you do with the water and baking soda?
A. Cook the coke.
Q. Now, can you describe the process of cooking cocaine to turn it into crack?
A. Put the coke in the water, add some baking soda and put some fire underneath of it, bring it down, and get it into a liquid form, add some more cold water to it to get it to solid back up.

THE COURT: Let me ask that the question and answer be read back.

(Record read)

Q. And when you say you boil it and you bring it down to a liquid form, what do you mean by that?

A. When it's powder, you put it in the water. The powder's just sitting all in the water. You add the baking soda to make it rise, and after it rises it will turn into a liquid, into a gel. And then the gel is sifted to the bottom of the powder, whatever you use to cook it in, and then you add cold water back to it to make it hard again.

Q. And when it become hard, what is that? What's it called when it become hard?

A. Crack.

Q. Did you cook any part of the Marlboro cocaine that you received from Plinio?

A. Yes.

Q. If I could finish the question. After Halloween in 1989, did you cook a part of that cocaine?

A. Yes.

Q. Now, before you cooked that part of the Marlboro cocaine, did you weigh it?

A. Yes.

Q. And after you cooked it, did you weigh it?

A. Yes.

Q. What was the result of cooking that cocaine?

A. It lost a lot.
Q. When you say "it lost a lot," it lost a lot of what?
A. Weight.
Q. Weight of what?
A. From what I weighed it before I cooked it.
Q. And "it" refers to cocaine?
A. Yes.
Q. Now, in the drug business, what is the term for the amount of weight of cocaine that is lost during the cooking process?
A. The return.
Q. Based on your experience, when a kilo of cocaine has a high return, does that mean that it lost a lot of weight or a little bit of weight during the cooking process?
A. A little bit.
Q. So a high return means a little bit of weight is lost?
A. Correct.
Q. And so, to a drug dealer, keeping everything else equal, is a kilo of cocaine good or bad if it has a high return?
A. Good.
Q. And everything being equal, if a kilo of cocaine has a low return, meaning that it loses a lot of weight

during the cooking process, is that good or bad?

A. Bad.

Q. Now, returning to the Marlboro load of cocaine that you received after Halloween in 1989, you testified that you cooked part of that cocaine?

A. Yes.

Q. And what do you recall was the odor that you smelled while you cooked that cocaine?

A. Like cat piss.

Q. Cat piss you said?

A. Yes.

Q. Now, is that normally a good sign or a bad sign to a drug dealer?

A. I smelled it before with other coke I cooked, and wasn't nothing wrong with it.

THE COURT: I'm sorry. We will have to have that answer read back.

(Record read)

Q. Now, after cooking the particular Marlboro cocaine, what was the result of the weight loss?

A. Bad.

Q. So that meant it had what kind of return?

A. A poor.

Q. A poor return you said?

A. Yeah.

Q. Now, had you cooked prior deliveries of cocaine from Plinio before?
A. Yes.
Q. How did the return for this Marlboro load compare to the prior deliveries of cocaine that you had cooked?
A. The worst.
Q. Which was the worst?
A. The Marlboro load.
Q. Do you recall what color the Marlboro load of cocaine was?
A. A vanilla color.

THE COURT: Did you say a vanilla color?
THE WITNESS: Yes.
THE COURT: Do you mean liquid vanilla that's kind of brown, or do you mean vanilla ice cream?
THE WITNESS: Like vanilla ice cream.

Q. If I can do it this way, I'm showing you an envelope, not what's inside the envelope, marked Government Exhibit 1 A. How did the color of the Marlboro cocaine compare to the color of the envelope that's marked as Government Exhibit 1A?
A. A little bit darker.
Q. Now, after finding that the return on Marlboro cocaine was poor, what did you do next?
A. Called Lou.

Q. What did you say to Lou?
A. I told him how much I lost when I cooked up some, and he said was I sure, and I said yeah, and he said, well, he's going to get in touch with Plinio.
Q. And did there come a time that you heard back from Lou?
A. Yes.
Q. What did Lou say then?
A. He said he got in touch with Pliny, and Pliny told him that he had got this from somebody else and he'd have to get in touch with the people and let them know, and he asked Lou was he sure that it was -- that it was problem with cooking it, and he said yeah. He said he would get back with him within a couple of hours.
Q. Who said he would get back with him in a couple of hours?
A. Lou told me that Plinio said he would get back with him in a couple of hours.
Q. That Plinio would get back in touch with him within a couple of hours?
A. Yes
Q. And in the beginning of your answer, you said that he, something to the effect that he got it from a different source. Do you recall that testimony?
A. Yes

Q. Who got it from a different source?
A. Pliny.
Q. Did there come a time that you heard back from Plinio in a couple of hours, you or Lou?
A. No, we heard back from him the next day.
Q. And what was the result of hearing back from Plinio the next day?
A. Well, Lou had told him that we had cooked up some more and that we was going to be able to sell it at a certain price, and if he was able to give it to us at that price, we'll keep it. And he said that he couldn't say on that right now, he would have to get back in touch with the people and see whether they agree with that price. He said he would get back with us.
Q. Now, you said that you could sell it at a certain price. Was that certain price higher or lower than the original price?
A. Lower.
Q. And when you testified to the effect that he said that he couldn't make that decision on the price reduction who were you referring to, who said that he couldn't make that decision?
A. Plinio.
Q. Did there come a time that you heard back from Plinio again?

A. Yes.
Q. You or Lou?
A. Yes, Lou did.
Q. I was going to ask for that. Who actually talked to Plinio?
A. Lou.
Q. Did Lou convey to you the substance of that conversation?
A. Yes.
Q. What did Lou tell you?
A. That Plinio said that they agreed on that price, but keep the stuff that we had cooked up, to send it back when we give -- send the money back.
Q. You say "send it back," send the cooked up cocaine back where?
A. Back to Plinio when we send the money back.
Q. And did there come a time that you send that cooked cocaine back?
A. No.
Q. What did you do with that cooked cocaine?
A. Sold it.
Q. And did you and Lou discuss selling that cocaine?
A. Yes
Q. What was the subject of that discussion?
A. He had talked back to Pliny to find out what time

it would be around getting the money, and he said that it would be double jeopardy to put the money and the coke in the truck and send it back up here, so he said don't do that.

Q. What do you mean when you say "it would be double jeopardy"?

A. Taking a double risk of putting the money and coke together.

Q. Do you recall when you received your next load of cocaine from Plinio in late 1989 after this Marlboro delivery?

A. Yes.

Q. When was that?

A. In November.

Q. Where relative to Thanksgiving?

A. I think it was right before Thanksgiving.

Q. Do you recall the size of that load?

A. It was small.

Q. When you say "small," what do you mean?

A. It was no more than ten or eleven keys.

Q. And what were the prices that you were being charged approximately around this time?

A. In the high 20s.

Q. And you received 10 kilos of cocaine?

MR. GHIGLIOTTY: Ten or eleven.

Q. 10 or 11 kilos of cocaine?
A. Yes.
Q. And that was a small load?
A. Yes.
Q. Do you recall who delivered that particular load of cocaine?
A. Between Ears and Tiberio.
Q. Do you recall how that load of cocaine was packaged?
A. In some green cellophane.
Q. What complaints, if any, did you have about that load?
A. None.
Q. What did you do with the money from selling that cocaine?
A. Sent it back.
Q. You sent all the money back?
A. Yes.
Q. Did you make a profit?
A. Yes.
Q. Now, when did you get your next load of cocaine after receiving the cocaine around Thanksgiving of 1989?
A. In January.

alternative oficina was headed by Jairo Pineda and operated out of California.

III. The Fall of 1989 and the "Marlboro-Brand" Cocaine

69. During the fall of 1989, FERNANDO GIL secured in excess of sixty kilograms of cocaine from a California supplier named Jairo Pineda. Although GIL used another source for this cocaine, the way GIL distributed those drugs, and some of his workers and customers, remained the same.

70. During the phase of the fall 1989 cocaine distribution, in order to avoid detection by law enforcement officials, FERNANDO GIL continued to rely on, among other things, public pay phones. cellular telephones and beepers to communicate with his associates and to direct his workers. And above all, GIL sought to insulate himself by not touching the cocaine itself; instead he relied on his workers and distributors to move the cocaine in the city and down the east coast.

71. GIL's main worker in the fall of 1989 (and indeed for many years) was defendant PLINIO PRIETO. After GIL obtained the load of cocaine from Pineda in the fall of 1989, it was PLINIO PRIETO who directly supervised the delivery of that cocaine to longstanding customers such as Everett Barber in the Washington, D.C., area.

72. Everett Barber, a/k/a "Lucky," testified at the trial. Barber and his partner Lou had been receiving FERNANDO GIL's cocaine through PLINIO PRIETO and the other workers from mid-1987 right up until the arrests in this case in May of 1990. Based on Barber's testimony, over the years, he estimated that around 500 kilograms of cocaine from PLINIO and his boss "FERNANDO." Although Barber never directly met FERNANDO GIL, he learned about him from PLINIO PRIETO. PRIETO repeatedly advised Barber that there would be no price reductions for the cocaine unless his boss "FERNANDO" authorized the reduction. PRIETO often told Barber that "FERNANDO" was pressuring him to collect the drug money from Barber. PRIETO also told Barber that his boss was a man named "FERNANDO" who brought his wife a Jaguar and lived on a horse farm outside of New York.

73. Barber testified that sometime after Halloween, in November 1989, he received 10-15 kilograms of cocaine from PLINIO. Barber recalled that particular deal because it involved the worst-quality cocaine he had ever received. He described the cocaine as having the brand name\label "Marlboro." Barber complained to PRIETO about the quality of the cocaine, and

PRIETO eventually succeeded in getting his boss FERNANDO to lower the price.

74. Significantly, the electronic and physical surveillances conducted by the agents and troopers in the fall of 1989 showed that FERNANDO GIL had in fact received a load of poor-quality Marlboro-brand cocaine from his California supplier and was trying to get a price reduction from that supplier.

75. For example, on the morning of November 10, 1989, agents followed FERNANDO GIL as he left the Ranch (where there was a working telephone), and drove to the Mobil Station Pay Phones, located just a mile from the Ranch. GIL used a pay phone to call a cellular telephone in California and speak with Jairo Pineda. During the intercepted call, GIL complained about the quality of the Marlboro-brand cocaine -- stating that they were all "open" and like coffee. In a coded fashion, GIL confirmed that Pineda's workers had delivered sixty kilos to him, but said that he needed to consult with his own workers in order to determine how much of each of the different brand of cocaine had been delivered. GIL complained that the cocaine was "pure junk" and he didn't want to get stuck with it. GIL agreed to call his supplier back as soon as he determined how many Marlboro- brand kilos had been received.

76. Within one minute of concluding that call, GIL placed another call to PLINIO PRIETO's beeper -- clearly in an

effort to determine how much of the cocaine was bad. GIL then called the home of one of his cocaine customers, defendant HERNANDO OSPINA, who was not in and again called PLINIO PRIETO's beeper. GIL when left the Mobil Station Pay Phones and returned directly to the Ranch. Within minutes of his return, GIL received a call at the Ranch from OSPINA and discussed in an even more coded fashion the poor quality cocaine.

77. The next day, FERNANDO GIL send his worker Jairo Uribe to the Mobil Station Pay Phones to call PLINIO PRIETO's beeper. In response to the beep, PRIETO called Uribe at the pay phones. They discussed in a coded fashion the need for PRIETO to determine how much of the cocaine was bad and needed to be exchanged. PRIETO made it clear that he didn't want to enter the (stash) house to make that determination. PRIETO complained that he was unable to come to an agreement with "FERNANDO."

78. Later that same evening, FERNANDO GIL returned to the Mobil Station Pay Phones and once again called his supplier, Jairo Pineda, at his California cellphone. During the call, GIL identified himself as "Pesca'o" (Fish). He confirmed that he had already determined how much of the cocaine was bad by

asking "the man" so "I wouldn't have to go in there." GIL indicated that only ten kilos were bad and tried to get a $1,000/kilo price reduction. He described the cocaine as "really ugly, coffee, coffee, no shine" and "burnt." Gil complained that he had to get rid of it (the cocaine) "with the blacks," and indicated that he already had to reduce the price of the cocaine for some other customers. (Everett Barber testified that due to the poor quality of the Marlboro-brand cocaine, he requested and ultimately got a price reduction from PLINIO.) At the end of the intercepted call, Pineda asked GIL to help him out, because he was expecting another large load of cocaine by the weekend. (In fact, Barber also testified that after receiving the Marlboro-brand cocaine after Halloween in 1989, he got a second delivery of cocaine from PLINIO.)

79. As in the past, it was still PLINIO PRIETO's responsibility to make sure that the money for the cocaine was collected and that an accounting was made to his boss FERNANDO GIL. As such, physical surveillances conducted in the fall of 1989, as well as wiretap calls and telephone toll record and pen register information during this period of time, also reflect numerous links between FERNANDO GIL and his principal worker, PLINIO PRIETO. In addition, JULIO ALVAREZ also testified that in the fall of 1989,

GIL told him that PRIETO was busy collecting money from GIL's cocaine deals; this testimony was further corroborated by a wiretap call in late November between GIL and ALVAREZ.

80. Throughout the fall, surveillance agents saw FERNANDO GIL, as well as his workers Uribe and Gomez, repeatedly leaving the Manorville Ranch, solely to travel to and use nearby public pay phone located at the Mobil Gas Station and other locations. In particular, video surveillance and a pen register device at the Mobil Station Pay Phones showed that GIL and his workers repeatedly called PLINIO PRIETO's beeper from the Mobil Station Pay Phones. For example, during the period of the Marlboro-brand cocaine -- on October 11, and November 10, 11, 13 and 15, 1989 -- FERNANDO GIL travelled to the pay phones and each time called PRIETO's beeper. In addition, during the period of November 1 through November 14, toll records for Jairo Pineda's cellphone show a total of 34 calls to one of the beeper numbers FERNANDO GIL used in the fall of 1989.

81. During this critical time period, surveillance agents also observed GIL meeting with PRIETO. For example, on November 13, just two days after GIL's second call with his California cocaine supplier, GIL used the Ranch telephone to talk with PLINIO PRIETO and complain about the service on his cellphone.

he told you he cooked the cocaine to take it from powder form down into crack form, and he got a bad return. What that meant is it lost a lot of weight when he was cooking the cocaine to make it in crack. It lost a lot of weight and when it loses a lot of weight, in the drug business that means you are losing a lot of money.

And Barber and Lou didn't like that and they got in touch with Plinio Prieto and they complained about that load, and ultimately, after Plinio had to go get permission, Lou and Barber got a price reduction for that delivery of cocaine after Halloween, some time in November of 1989.

And, ladies and gentlemen, what was the logo that Everett Barber told you was on that particular load of ten to fifteen kilograms of cocaine? Marlboro, like the cigarette. and it is exactly that brand of cocaine, Marlboro, you heard Fernando Gil on the pay phone at the Mobil gas station complaining about on November 10, 1989. The conversation that was intercepted over the wiretap on the pay phones.

And, ladies and gentlemen, that ain't no coincidence. The Marlboro cocaine that Fernando Gil was talking about was part of the same shipment of Marlboro cocaine that Fernando Gil had his main worker Plinio Prieto deliver down to Everett Barber in Washington, D.C.

Now look at the one-two punch, the overlap

break, were talking about 508-5233, Plinio Prieto's beeper. So let me return to who Gil was calling when he made his road trips to the Mobil Gas Station.

Now, through different types of evidence that I discussed, surveillance, agent testimony, the wire taps, you could hear Gil's voice over the phone, and videotapes, the government has shown that Fernando Gil went to the gas station pay phone on these dates: On October 11, 1989, November 10, 1989, November 11, 1989, November 13, 189 '89, November 15, 1989, during the fall period.

You will hear about other trips to the pay phone later on in the case. But during the fall period, we proved those dates. Now, each of these times -- and you can confirm that by looking at Government Exhibit 500 New, which is the summary of the pay phone -- each of those times he made a trip to the pay phone, he beeped Plinio Prieto, 508-5233.

Of course that makes perfect sense because it was during this time period, the dates that I gave you, it was just before and just after the time period when Everett Barber told you that he got his 10 to 15 kilos of cocaine of Marlboro cocaine from Plinio. So it makes sense during this time that Fernando Gil is reaching out to his worker Plinio Prieto.

Ladies and gentlemen, you know from the wiretap

on the pay phone that Gil did not use the gas station pay phone, the Mobil Gas Station pay phones, just to talk to Plinio Prieto. Fernando Gil, for example, also used the pay phone to talk to his supplier out in California when he called the California cell phone. And that takes us to November 10, 1989 and to Government Exhibit 16, the first Marlboro call.

Now, on November 10, 1989, Fernando Gil would have been a heck of a lot better off if he had decided to stay in bed. But instead, he decided to conduct some business over the pay phone at the Mobil Gas Station.

Now, you know from a surveillance agents that were following Fernando Gil on that day that the Mobil Gas Station pay phone wasn't the only pay phone that he used. In the morning, agents followed Fernando Gil to a nearby shopping center. In there he used a pay phone. Then, at about 20 minutes to 11 o'clock in the morning, Gil went to the post office between the ranch and the Mobil Gas Station.

And if you look at the chart, what he was observed doing is that Fernando Gil, at about 20 minutes to 11 o'clock in the morning on November 10, was here in this area. and you see that he was close to the ranch and farther away from the Mobil Gas Station. But instead of going home to use the phone, Fernando Gil went to the Mobil Gas Station to use the phone. And he had the real good

ten boxes of what is unintelligible, and he is saying probably it not as good a product, and he goes on and he says, "the rest, the rest of the boxes are number A1, they're the brand Marlboro, Marlboro cigarettes."

Now, ladies and gentlemen, once again let me remind you of Everett Barber down in D.C. He testified that at some point after Halloween in 1989 he got a shipment of Marlboro cocaine like the cigarette, and part of what Fernando Gil got from the California supplier went to Everett Barber.

Then, if you look in the middle of the page, the supplier says, "I guarantee, I guarantee they're ten and if it's not like that, call me back so I can call Juancho." Juancho is the supplier's worker in New York.

And in fact, you can look at it in the jury room -- and I am not going to step through in detail -- if you look at Government Exhibit 13, which is a call on November 7, 1989, again from the Mobil Gas Station pay phones, in that call, Chiqui is at the pay phones on behalf of Fernando Gil and he is talking to a Juancho, and in that call Chiqui says he's at Pescado's office. He's at the pay phone saying he's at Pescado's office.

What he's saying is that he's making a call on behalf of Pescado, who is Fernando Gil, and he goes on in that conversation, Chiqui, in that November 7 conversation

advising him, look I gave you good price for these kilogram packages, don't mess with me.

Q. On page 7 when the unknown male says, OK, look, give me the information as to the brand and you call me and tell me, do you have an opinion what is being referred to?

A. He is referring to kilograms of cocaine. He wants Fernando Gil to make sure he knows exactly what he received to call him back to resolve the situation. Traffickers don't want to leave a situation on were there is a problem with either a delivery or packaging too long. They want to resolve it quickly.

Q. If the jurors could turn to Government Exhibit 14 or 14 A and I am showing you what has been marked as Government Exhibit 14 A. Have you reviewed that transcript while listening to the corresponding tape?

A. Yes, sir.

Q. And this is a call on November 10, 1989 at 11:03 a.m. between Fernando Gil and Hernando Ospina. Directing your attention to the bottom of page 2, Fernando Gil says, Did you throw out the garbage, did they already pick up the garbage?
Do you have an opinion as to what is being referred to?

A. From the whole context of the conversation they are referring to the bad cocaine.

Q. Have you ever heard the term garbage used in the cocaine trafficking business?
A. I have used that term personally in an undercover capacity and as overhearing that term as well from other traffickers I was dealing with.
Q. As you heard that term used what does it mean?
A. It means bad quality cocaine, bad product.
Q. On the top of page 3 Hernando Ospina says, Let's see if they take at least half, let's see. Do you have an opinion as to what is being said?
A. Referring to the person who is actually going to buy the cocaine to see if they take at least half the stuff that they have, half the merchandise.
Q. At the bottom of page 3 when Fernando Gil says And it seems that he sent you, you, because, no, there were, no, after he had picked out the plastic ones for you because according to what he told me there were just ten little plastic rods and the others were all copper pipes.
Do you have an opinion as to what is being referred to?
A. They are referring to the cocaine packages, being plastic and copper.
Q. Do you have an opinion as to what ten little plastic rods refers to?
A. 10 little plastic rods refers to the packages of

cocaine from the previous conversation that they were saying was bad.

Q. Do you have an opinion as to what copper pipes refers to?

A. The higher quality of cocaine or the Marlboro and 1-A and such.

Q. Toward the top of page 4 Fernando Gil says, Hell, that too, well let's see if it's true or if they bought them all in plastic, and Hernando Ospina says, Yeah sure, and then that plastic pipeline is cheaper because it is PBC.
Do you have an opinion as to what is being discussed?

A. Bad quality cocaine they are discussing there because the bad quality cocaine is generally cheaper than the good quality stuff because of the quality.

Q. Just below that where Fernando Gil says, Well it must be, brother, no, you told me to to make sure, brother, because he needed to have that fixed, to change all that pipeline.
Do you have an opinion as to what is being referred to?

A. The known caller from the previous conversation was insistent or was very determined that Fernando Gil check to see exactly what he had. The problem as far as changing and fixing referred to changing the order or changing the

load of cocaine, which is expensive because they have to pay for transportation again of the actual product and exchange if that does take place.

Q. At the bottom of page 4 and the top of page 5 when Hernando Ospina says, Sure, it's logical, let's say that we solder better with copper pipe, do you have an opinion as to what is being said?

A. Copper pipes referring to the good-quality cocaine, solder, it's that they are referring to the cocaine that -- the better quality is easier to sell.

Q. And directing your attention to the middle of page 6, when Hernando Ospina says, Yeah, the best thing will be to throw out even if it is only that garbage until it can be finally taken, right?
Do you have an opinion as to what is being referred to?

A. The cocaine, the actual bad product being finally taken referring to the bad cocaine or less-quality cocaine.

Q. Below that, Fernando Gil says, I need to speak with him and Hernando Ospina says, Of course, brother, well, already one pays the garbage truck and they will take it. Do you have opinion as to what is being referred discussed?

A. They are referring if one pays for the transportation cost they will take the cocaine packages as

as far as the bad ones.

Q. Who would go and take the cocaine?

A. The supplier.

Q. Showing you Exhibit 17 and if the jurors cold turn to Exhibit 17 or 17 A in the binders. Have you previously reviewed that transcript while listening to the corresponding tape?

A. Yes, sir.

Q. This is is a conversation on November 11, 1989 between Fernando Gil and Hernando Ospina. At the bottom of page 11 and the top of page 12 Fernando Gil says, About those pipes, not to think that he didn't know and since they came already packed, the plastic ones and the copper ones, not, to, well. Do you have an opinion as to what is being referred to there?

A. Referring to the previous conversation to the plastic pipes and the copper pipes, referring to the cocaine packages.

Q. Plastic ones refers to what, in your opinion?

A. The plastic one refers to lesser-quality cocaine packages versus the copper pipes being the higher-quality cocaine.

Q. Below that where Gil says, And he got there and he told me, look, I had looked at them since just those few came, I gave them those fewer ones, understand, do you have

discussed?

A. The unknown male wants him to get rid of the cocaine packages as soon as possible because apparently there is more product coming down the road. And Fernando Gil says, God willing have very little left after tomorrow, meaning he would have very little cocaine packages left to sell.

Q. Toward the bottom of page 4, when Fernando Gil says, Listen, are you going to reduce for me for those ten, unknown male says, No, and Fernando Gil says, reduce it 1,000 pesitos brother that they look really ugly, coffee and no shine, there are some that are burnt. Do you have an opinion as to what is being referred to there?

A. He is referring to the kilograms of cocaine that are bad and wants to reduce it by a thousand dollars per kilogram so far as the price that he has to pay for it and in order for him to sell it, if he can have a cheaper price to sell. The coffee, coffee, no shine and such is referring to the texture or the color of the cocaine being that cocaine generally if it starts turning yellowish or brownish color is when it is showing lesser quality or exposure to air or that type of element or moisture, and it will change its color from the flaky whiteness that it was

the video and you know that from the surveillance testimony.

What does Chiqui do? He beeps Plinio Prieto, 508-5233. there's an incoming call from Plinio Prieto, and that is Government Exhibit 19.

Let me back up for a minute. Do you recall during corss-examination of Mr. Gil when I asked him at first whether Chiqui worked for him in the fall of 1989, he was very evasive about that. Finally, when he was pressed, he admitted, "Well, yes, Chiqui did work for me."

Well, ladies and gentlemen, this call is one of the reasons why Fernando Gil didn't want to admit easily that Chiqui worked for him, because in this call Chiqui is doing a drug errand for Fernando Gil. and if you look at Government Exhibit 19, you see that there's a call over the right Mobil Gas Station pay phone. It's between Jairo Uribe and Plinio Prieto.

Chiqui beeps Plinio. Plinio calls in. Plinio tells Chiqui, "Tell that one that I was going to make that change no because yesterday, as you saw, they arrived late and I was left without a car now." They're talking about getting the information on the bad cocaine and making the switch with Juancho or other workers of the California supplier.

And then Plinio says, "Those guys were telling me that it wasn't five but ten, that what should I do? To

change all of them, or what?" And there's some confusion at this point as to whether or not they should exchange 5 kilos or the 10 kilos of cocaine that Gil had been talking to the California supplier about, about the ten bad kilos.

Then, what Plinio says next is very telling at the bottom of page 2. He says, "they are waiting for me over there. It's that with ten I can't talk, enter or leave that house, brother, because I'll spoil things, brother, then." and that's not worthy, ladies and gentlemen, because again he's conscious of detention, he's concerned about going in with 10 kilos of cocaine into the stash house.

Then, ladies and gentlemen, look on page 3. What does Plinio say to Jairo Uribe, to Chiqui? He says, "I can't come to an agreement with Fernando." And the Fernando he's talking about there, ladies and gentlemen, is Fernando Gil.

An you remember when Mr. Gil said on cross-examination that he was on the phone talking to the supplier in California, talking to the man on the California cell phone, he said he was pretending to be Freddie who happened to have the nickname Pescado.

Well, ladies and gentlemen, Plinio Prieto says, "I can't come to an agreement with Fernando," not with Freddie. And they are not talking about horse bits, they're talking about cocaine.

14 February 1997

Mr. Peter J. Scuderi, Esquire
1420 Walnut Street, Suite 1000
Philadelphia, PA 19102

Re: Ospina tape

Dear Mr. Scuderi:

Pursuant to your request of 29 January 1997. I have reviewed Government Exhibits 14 in the aforementioned matter and generated a transcript of the recorded telephone conversation which transpired in Spanish as well as an English translation of same.

To the best of my knowledge, the transcript should serve a trial jury only a as a guide to the evidence. By itself, the transcript is not evidence according to current law. Assuming there were no jurors sitting at this trial proceeding who were totally fluent in the Spanish language and familiar with Colombian dialect and culture, this transcript and translation may have served them only as a guide to the conversation that took place between the participants and the meaning of the words. The recording is audible and intact. There are no discernible discontinuities in the recording process indicating possible tampering with or doctoring of the actual utterances made by the parties.

Hereinafter, I will suggest various utterances in the recording of the Spanish conversation that may be the subject of controversy given their multiple meanings depending on the context of the conversation and their usage.

The third allocution attributed to Fernando Gil in page 3 of the transcript where the Spanish read "repuesticos", I employed the English words "few supplies". "Repuesto" is the irregular past participle of "reponer" meaning " replaced, reinstated; restored. It can also be used to express "recovery" from an illness, shock, etc. A "repuesto" is also a masculine noun with different meanings such as 1. stock, supply. 2. spare, spare part. 3. sideboard, cupboard: if used with the preposition de, i.e. "de

repuesto", the closest English noun used in translation would, then, be "spare", or "extra part". The plural of "repuesto" is formed by adding an "s" at the end of the word. The diminutive, employed in this particular instance, with the use of the particle "ico" plus the "s" alludes, in my opinion, "the few supplies" or, if you may, "the few parts". To the best of my knowledge the usage of the diminutive and the plural for a masculine or feminine noun in Colombian idiomatic usage of Spanish in this instance makes reference not to the size of the object signified but to the number. Therefore, if we have "repuest-ico-s" uttered by a Colombian speaker, my inclination would be to use an English phrase that expresses "a small number of parts". As the conversation seems to relate to home repairs, construction, refurnishing, restoration, plumbing work ("the boiler broke down". page 1 fourth allocution attributed to Hernando Ospina) etc.. and the background noises heard throughout the conversation tend to verify that at least, one of these activities is taking place. In my the English translation "the few supplies that you sent for" correctly represents the import of the Spanish original.

The fourth allocution attributed to Fernando Gil in page 4 of the transcript where the Spanish read "filtrarse", I would suggest using the English word "leak". While "filter" in some contexts would serve as a cognate to the Spanish verb "filtra" meaning "to sieve" or "to filter", it is my contention that what is meant here is so that "it will not leak on referring to the plumbing.

In the fourteenth line of the transcript, the Spanish work "canequita" (diminutive of "caneca") on page 4 should read "bucket", "jar" or "container" in translation. "Caneca" refers to a 1. pocket flask, liquor bottle. 2. wooden bucker. 3. a liquid measure of 19 liters. 4. an earthenware water cooling jar. It is likely that the reference in this conversation is a bucket, a pail, or jar with a capacity to hold approximately 19 liters or any liquid measure larger than a small liquor bottle or pocket flask since it is meant to be used "to pluck the chickens" as explained by the parties.

Your client's contention that this conversation is not related to any illegal activity is well taken. Unfortunately, if a lay person is supposed to pass judgment as to what

this conversation is about by only reading the English translation she will miss out the many elements of speech that impart contextual meaning to the verbal exchange such as intonation, rhythm, accent, variations in volume; the intimacy and authority of expression between the speakers; the formality, speed, power, and lightness of the oral delivery. All of which disclose the way in which the speakers perceive the world understand themselves, and the object of their conversation. In a transcript, the context of the conversation falls by the wayside.

The late Jorge Luis Borges wrote, "Language is a tradition, a way of experiencing reality not an arbitrary repertory of symbols - prologue to El ojo de los tigres (1972). The technique employed in simultaneous oral interpreting also applied to translating any recorded conversation even after a written transcript of the spoken Spanish has been generated. To interpret statements, arguments and testimony in open court requires transposing it with its entire semantic emotional and aesthetic baggage into a language using completely difference modes of expression.

"To interpret is initially to comprehend perfectly the message so as to be able to detach it from its verbal support and to reconstitute it subsequently with all its nuances in another language. This is a constant exchange and interchange of mentalities, of one cultural universe with another." (Whorf Benjamin Lee "the Relations of Habitual Thought and Behavior to Language" *Language, Thought, and Reality* M.I.T. Press, 1978: 134-59).

Instead of turning around the source language (Spanish) into the target language (English) out loud the in open court before the presiding judge, the trial jury, and court personnel where the interpreter is able to watch the speakers and assess the gestures that make up for the unspoken thought as well as all other nuances that make up context in this instance the language expert has to create a written transcription of the Spanish and both interpret and translate the spoken as well as the written word. Independently of the merits of the language expert the actual process robs the conversation of all contextual referents, thus leaving a void that can only be

filled via the trial testimony.

The allegations are that this is a coded conversation and that the allocutions and speech acts referred to such as rods; pipes; buckets; pails; or jars; throwing out and picking up the trash; getting the supplies; changing the pipes (copper and silver), fixing the boiler; and securing the wire rods for the parrots' cage, etc., all constitute veiled references to drug transactions. By following what I call the first matrix of signification an ordinary listener would not know that the language is cyphered. That is there are many references to different materials, parts and supplies to be used for different purposes and functions in addition to noise of metal clanging and fixtures screeching in the background leading one to believe that what's taking place is a bona fide conversation between individuals involved in some type of plumbing repair project. The second matrix of signification that gives rise to the metaphorical charge or the twists in the words (the code) willfully and deliberately orchestrated by mutual agreement. In order to conceal the illegitimate venture at hand would have to be set forth through the testimony of direct witnesses and/or participants in the scheme as it cannot be readily discerned by listening to the conversation.

The government, in this case, rendered a faithful transcript and, if my suggestions are incorporated into the official record a correct translation of the original spoken conversation. It is likely that these transcripts were

distributed to the jury by the prosecutors in the case as an aid. We do not know whether the audiotapes were actually played for the jury at trial. Being the actual evidence, let us hope they were. Otherwise, I would consider the integrity of the process to be flawed even though it could be argued that the jury or court officials do not understand Spanish and their listening to the tapes would not serve any practical purpose. Nevertheless, listening to the actual conversation would, at least, afford them the opportunity to hear the voices attributed to the defendants and some of the constitutive elements of contextuality. Besides, I belive, it is the only proper way to present the evidence if the process is going to be taken seriously. The conversation as transcribed and translated may seem disjointed or stilted to your client because it lacks the elements that feeds its

context and significance, as mentioned in the third page of this letter. Not because it was deliberately made out to read that way due to gross negligence or incompetence on behalf of the interpreter/translators. It is a natural product of the mechanics of the translation process persay. Idiomatic expressions have been taken into account but can only be rendered into English by selecting the closest correlate to the Spanish, a tall order indeed. The process of interpreting, transcribing and translating speech in a case involving transcripts and translations of recorded conversations to be moved into evidence at trial can only be compared to the killing and dissection of an animal, labeling its components, and then attempting to bring it back to life so that it may explain out loud how the sum of its parts function as a whole. No wonder Machiavelli called "translators traitors". Little did he know the extent to which the modern State whose exiological underpinning he contributed to conceive would carry our burden.

The process itself is one of falsification (term of art in symbolic logic) and in a legal proceeding where the parties (jury, judge, attorneys, court officers, and defendants) are not conversant with the languages, we have a falsification process operating at three levels. From the source language (English) to target language (Spanish) and vice-versa in the spoken part of the proceedings. Besides in examining this particular piece of evidence, the jury would have had to evaluate the

content of the conversation based on that transfer of thought and meaning from one linguistic and cultural "code" to another where the contention by the government is that the plain speech in the original Spanish language conversation was cyphered. Hardly a discernible phenomenon in the actual conversation that ensued in Spanish and even more difficult to glean from a hard-copy translated into English. Therefore, I reiterate that, a prima facie, there is no way of knowing whether this particular conversation has anything to do with illegal activity absent extrinsic evidence thereof that can be directly connected to the particulars discussed by the interlocutors.

Should you have any questions, please do not hesitate to call me at (215) 627-5952.

Scuderi
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Very truly yours,

/s/ Raymond J. McConnie
Raymond J. McConnie

rjm
enclosures

157. Base Offense Level: Offenses in violation of 21 USC 846 are covered by 18 various U.S. Sentencing Guidelines Sections. The most analogous guideline is found in Section 2D1.1 which covers the object of the conspiracy, possession with intent to distribute cocaine. Section 2d1.1(c) (6) provides that offenses involving at least 5 kilograms but less than 15 kilograms of cocaine have a base offense level of 32. Since the instant conspiracy involved 12 kilograms of cocaine, the base offense level is 32. 32

158. Specific Offense Characteristics: 0

159. Adjustment for Role in the Offense: 0

160. Victim Related Adjustments: None 0

161. Adjustment for Obstruction of Justice: Should the previously noted testimony of the defendant be considered perjurous, constituting obstruction of justice, a two level increase would become applicable as directed under Section 3C1.1 of the guidelines. The Probation Department respectfully defers to the Court on this issue. 0

162. Adjusted Offense Level (Subtotal): 32

163. Adjustment for Acceptance of Responsibility: We believe the defendant has not shown recognition of

responsibility for the offense and a reduction of two levels for Acceptance of Responsibility is not considered applicable under Section 3E1.1(a).

164. Total Offense Level: 32

165. (Note: Should two levels be added for obstruction of justice, the resulting total offense level would become 34).

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudication(s)

166. None.

Adult Criminal Conviction(s)

167. A check with the FBI and the New York State Division of Criminal Justice Services, Bureau of Identification, reveals no prior criminal record for this defendant.